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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re H. N., JR., et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

S. S.,

Defendant and Appellant.

D054876

(Super. Ct. No. J515660B-D)

APPEAL from a judgment of the Superior Court of San Diego County, Laura J. Birkmeyer, Judge. Affirmed.

S.S. appeals a judgment terminating her parental rights to her minor children, H.N., Jr., O.N., and G.N. (together, the minors), under Welfare and Institutions Code¹

¹ Statutory references are to the Welfare and Institutions Code.

section 366.26. S.S. argues the court lacked sufficient evidence to support its findings that the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(B)(i) and the sibling relationship exception of section 366.26, subdivision (c)(1)(B)(v) do not apply to preclude terminating her parental rights. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2004 the San Diego County Health and Human Services Agency (the Agency) filed petitions on behalf of then three-year-old H.N and one-year-old O.N. under section 300, subdivision (b). The petitions alleged that the children had been exposed to domestic violence in the home between their parents, S.S. and H.N., Sr. (Father).² The court detained the minors with S.S. on the condition that Father remain out of the home. During the next 12 months, S.S. obtained a restraining order against Father and she participated in numerous services, including a domestic violence program, parenting classes, therapy and a psychological evaluation. Father also participated in a domestic violence program and in therapy. In January 2006 the court granted the Agency discretion to allow Father to return to the family home.

Around May 2006 reports of domestic violence in the home resurfaced. The Agency filed petitions under section 387 on behalf of H.N., O.N. and their sister,

² H.N., Sr. is not a party to this appeal. H.N., Sr. will be referred to as Father in this opinion because he shares his name with H.N., Jr., a minor subject to this appeal.

Jennifer.³ The Agency also filed a petition on behalf of the minors' baby brother, G.N. The petitions alleged that the parents had engaged in domestic violence and refused to comply with a safety plan designed to allow the children to remain in the family home. S.S. stated she did not believe the violence was problematic unless Father were to beat her to death. The Agency social workers believed the parents had not benefitted from the many services that had been provided to them. The social workers recommended detaining the minors in out-of-home care and that reunification services be offered to the parents. The court placed the minors and Jennifer in out-of-home care with a non-relative extended family member (NREFM) in September 2006.

S.S. received six months of services. At the six-month review hearing, the court granted her an additional six months of services and scheduled a review hearing for November 2007. In August 2007 the Agency filed modification petitions under section 388, requesting that a previous court order granting S.S. unsupervised visits with the minors be changed to supervised visits. The petition alleged that O.N. returned from an unsupervised visit with S.S. with a bruise on his left cheek. O.N. disclosed that S.S. hit him. In an addendum report, the social worker reported O.N.'s statements that he had been hit with a belt. O.N. also stated S.S. hit Jennifer and H.N., but they denied the abuse. S.S. denied the allegations and claimed the minors' caregiver abused the minors. The caregiver reported that S.S. did abuse the minors and would tell the minors to say the

³ Jennifer is not subject to this appeal.

caregiver hit them. The court scheduled a hearing to address the allegations of the 388 petition.

While awaiting the hearing, the Agency submitted an 18-month review report. The social worker noted there had been numerous child abuse referrals made during the time S.S. had participated in unsupervised visits with the minors. The allegations included hitting the minors and allowing the minors to watch adult movies. The social worker believed S.S. told the minors to lie to their caregivers. The social worker further noted the minors were regressing due to the actions of their parents. The minors' therapist noted that H.N. and O.N. were anxious, withdrawn and sometimes aggressive.

Before the 18-month review hearing and section 388 hearing took place, S.S. participated in a psychological evaluation. Dr. Beatriz Heller reported that S.S. had a low frustration tolerance, was easily angered and was uncooperative. Dr. Heller diagnosed S.S. with chronic posttraumatic stress disorder and borderline personality disorder. At the 18-month review hearing, the court terminated services to S.S. and scheduled a section 366.26 hearing.

In a section 366.26 assessment report, social worker Santana assessed H.N., O.N. and G.N. as adoptable based on their good health and lack of developmental problems. Santana reported that Jennifer lived in a separate foster home from the boys and would be difficult to adopt because she was an older child, was bonded to her parents, and she did not want to be adopted.

Santana reported that the minors had participated in weekly visits with S.S. since May 2006. S.S. did progress to unsupervised visits but those visits became supervised in

September 2007 after O.N. stated S.S. hit him with a belt. Visits generally went well between S.S. and the minors. The minors interacted well with S.S., they displayed affection toward her and they were happy to see her.

The minors had lived with a NREFM for about one year. The Agency initiated visits between the minors and their paternal grandmother from Mexico. The grandmother participated in visits and therapy sessions with the boys. The visits with the grandmother went well, and the grandmother's home had been approved for placement by Mexican social services. Santana opined the minors would benefit from living together with the paternal grandmother. The paternal grandmother and the minors' current caregiver were willing to adopt the three boys. In addition, numerous other families were available to adopt the sibling set.

In September 2008 S.S. requested that the minors be made available for a bonding study. The court authorized the parent-child bonding study between S.S. and H.N., O.N. and G.N.. S.S.'s attorney selected Dr. Sonia Carbonell to conduct the study. Before the study took place, Dr. Carbonell disclosed she had a prior history with S.S. She had provided services to S.S. in May 2005. Social worker Santana did not object to Dr. Carbonell proceeding with the study.

Dr. Carbonell observed the minors with S.S. for five and a half hours over the span of two days. She also interviewed S.S. and the minors on an individual basis. Dr. Carbonell reported that the minors would suffer irreparable, emotional damage if parental rights were terminated. She stated that H.N. and O.N. told her that they wanted to go home to their mother. Dr. Carbonell concluded the minors would benefit from

continuing their relationship with S.S.; they had a primary bond with her and they all had a secure attachment to their mother.

At the section 366.26 hearing, Santana testified that the minors had been placed with their paternal grandmother in Mexico and that they did not have trouble separating from their previous caregivers. Santana expected there might be some short-term adjustment problems, but no problems had surfaced as of the 366.26 hearing; instead, there were signs that O.N.'s behavior had improved. Santana admitted that the minors would suffer some detriment at the separation from S.S. but the detriment would not be so serious that the minors could not adjust or form new attachments with their grandmother.

Santana acknowledged that H.N. cried on one or two occasions at the end of visits with S.S. and that he loved S.S. However, H.N. stated that he wanted to live with his caregivers. Santana also asked O.N. about where he would like to live after arrangements had been made to move the minors to Mexico. O.N. also said he wanted to live with his caregivers. When the minors prepared to leave for Mexico, they did not cry or protest when Santana came to pick them up. Once in their new placement with their grandmother, the minors did not show signs of distress or behavioral problems. They were adjusting well in their new home.

The minors' therapist, Gloria Chavez, counseled the minors from October 2006 until December 2008. Chavez testified she never met with the minors and S.S. for joint sessions, and that she had not been consulted about the bonding study that took place. During therapy, Chavez worked with the minors to address the trauma they experienced

when living with S.S. They endured domestic violence in the home and disclosed suffering abuse at the hands of S.S. Chavez believed the minors did not feel safe with S.S. After their removal, the minors did miss S.S., but over time they stopped asking to go home. Chavez held therapy sessions between the minors and their grandmother to address the move to Mexico. Chavez believed the grandmother was a loving and attentive person. She also believed the minors could develop appropriate attachments with adults and were developing a healthy attachment to their grandmother.

After considering the evidence, the court found the minors were adoptable and none of the exceptions to adoption applied to preclude terminating parental rights. The court found the beneficial parent-child relationship exception did not apply. S.S. participated in regular visits with the minors, but the court did not find the relationship between S.S. and the minors outweighed the benefit of permanence that adoption would provide. The court also found the sibling relationship exception to adoption did not apply.

The court discussed Dr. Carbonell's testimony and found it to be "exceedingly bias[ed]" toward S.S. The court also found Dr. Carbonell had a conflict of interest. The court noted Dr. Carbonell did not talk to the minors' therapist and she discounted any negative facts regarding S.S. Dr. Carbonell did not fulfill the court's need for an independent evaluator. The court terminated parental rights. S.S. timely filed a notice of appeal.

DISCUSSION

I

S.S. challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(B)(i) did not apply to preclude terminating her parental rights. She asserts she regularly visited the minors and shared a strong parental bond with them.

A

We review the judgment for substantial evidence. (*Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*)). If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. We do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order, and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination of parental rights

would be detrimental to the child under one of six specified exceptions. (§ 366.26, subd. (c)(1)(B)(i)-(vi); *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if termination of parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the relationship" to refer to a parent-child relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Although day-to-day contact is not

required, it is typical in a parent-child relationship. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) The parent must show he or she occupies a parental role in the child's life, resulting in a positive and emotional attachment from child to parent. (*Autumn H., supra*, at p. 575; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

B

The court found S.S. regularly visited the minors. Thus, we examine only whether substantial evidence supports the court's finding S.S. did not have a beneficial relationship with the minors.

The record shows H.N. and O.N. had spent a significant part of their lives as dependents, and that G.N. had been a dependent most of his life. S.S. initially made progress with services and the minors remained in her custody. However, S.S. did not show she had the means or ability to care for or protect the minors, even when they lived with her or when she had unsupervised visits. The many years of reunification services that she received did not ameliorate the problems that led to the minors' dependency.

Admittedly, the evidence shows a relationship does exist between S.S. and the minors. S.S. visited the minors, displayed affection toward them, she played with them and attended to their immediate needs. The majority of visits ended without incident. After one or two visits, H.N. cried and had to be consoled by S.S. However, there was no evidence the minors had a substantial, positive emotional attachment to S.S. to permit the conclusion that terminating parental rights would result in great detriment to the minors. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) Social worker Santana testified the minors would miss S.S. and there would be some emotional distress if parental rights were

terminated, but that it would be not "seriously detrimental." Until now, Santana had not observed any behavioral problems or signs of distress in the minors since they moved to live with their grandmother. The minors were happy in their new home and attaching well to their grandmother. The minors told Santana that they liked living with their grandmother. Before the minors moved to Mexico, Santana asked H.N. and O.N. where they wanted to live and they did not state they wanted to live with S.S. Santana believed the minors' need for need for stability and permanence in their lives was of great importance for their emotional and psychological needs.

The minors' therapist, Chavez, testified that she worked with the minors for about two years. Chavez held sessions between the minors and their grandmother to ease the minors' transition into their new home in Mexico. The therapist noted the minors were able to form new, healthy and secure attachments with their grandmother. When questioned as to whether the minors had a "secure attachment" to their mother, Chavez explained that the minors had many negative behaviors when they started therapy. They were aggressive, hyper-vigilant and showed signs of avoidance. The therapist believed the minors had experienced trauma in the past when they lived with S.S. Chavez did not state the minors would suffer irreparable damage if parental rights were terminated. She instead responded that as long as the children had a "secure connection with an adult figure . . . that would be very positive in the future interaction." Chavez stated that the minors did miss their mother during the early stage of their dependency, but their feelings of loss and grief subsided and they did not express that same desire to return home. We acknowledge that the minors might grieve and feel a sense of loss if they no longer had

contact with S.S., but there was no showing the minors would be greatly harmed. To require a parent show only "some, rather than great, harm at this stage of the proceedings would defeat the purpose of dependency law." (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.)

S.S. relies on *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*) to support her argument that the minors will be greatly harmed by the severance of their significant, positive relationship with her. Further, she claims a parent need not show a "primary attachment" for the beneficial parent-child relationship exception to apply. She argues the facts of her case are similar to the facts in *S.B.* because, like the father in that case, she regularly visited the minors and shared affection with them. In *S.B.*, this court reversed an order terminating the father's parental rights over his daughter under the parent-child beneficial relationship exception to adoption. In that case, the father complied with every aspect of his case plan, frequently visited the minor and was devoted to her. Further, the minor loved her father and wanted to live with him. (*Id.* at pp. 294-295.) This court concluded the minor would be greatly harmed by the loss of the significant, positive relationship the minor shared with her father. However, while factual comparisons between cases provide insight, these comparisons are not dispositive. The determination on appeal is whether there is substantial evidence to support the trial court's findings that the beneficial parent-child relationship exception did not apply. We conclude that on the facts of this case, the trial court had sufficient evidence to support its findings. Further, *S.B.* "does not . . . stand for the proposition that a termination order is subject to reversal

whenever there is 'some measure of benefit' in continued contact between parent and child." (*In re Jason J.* (2009) 175 Cal.App.4th 922, 937.)

After balancing the strength and quality of the parent-child relationship against the security and sense of belonging that an adoptive placement would give the minors after three years of dependency proceedings, the court found the preference for adoption had not been overcome. Substantial evidence supports the court's finding the section 366.26, subdivision (c)(1)(B)(i) exception is inapplicable. (See *In re Clifton B.* (2000) 81 Cal.App.4th 415, 425.)⁴

II

S.S. contends the sibling relationship exception set forth in section 366.26, subdivision (c)(1)(B)(v) applied to compel a permanent plan other than adoption. She asserts the minors' sister, Jennifer, had a close and significant relationship with the minors and that ongoing contact with the Jennifer was in the minors' best interests.

⁴ S.S. further asserts that the Agency made an improper recommendation for adoption because the recommendation was based on financial considerations for the grandmother. Specifically, adoption would provide the grandparents with more income. Santana testified that financial differences between adoption and guardianship do exist. He asserted that finances were not a primary factor in making the recommendation for adoption but rather, it was one of many considerations.

A

Section 366.26, subdivision (c)(1)(B)(v) provides an exception to terminating parental rights when the juvenile court finds there is a compelling reason for determining that termination would be detrimental to the child due to substantial interference with a child's sibling relationship. Factors to be considered include the nature and extent of the relationship, whether the child was raised with a sibling in the same home, and whether the child has strong bonds with a sibling. The court must also consider whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption. (§ 366.26, subd. (c)(1)(B)(v); see also *In re L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 951-952.) The purpose of this exception is to preserve long-standing sibling relationships that serve as "anchors for dependent children whose lives are in turmoil." (*In re Erik P.*, *supra*, 104 Cal.App.4th at p. 404.)

The sibling relationship exception contains "strong language creating a heavy burden for the party opposing adoption." (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 813.) The exception focuses exclusively on the benefits and burdens to the child being considered for adoption, not the other siblings. (*Ibid.*) Similar to the beneficial parent-child relationship exception, application of the sibling relationship exception requires a balancing of interests. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 951.) However, the parents have the burden to show: (1) the existence of a significant sibling relationship; (2) termination of parental rights would substantially interfere with that relationship; and (3)

it would be detrimental to the child if the relationship ended. (*Id.* at pp. 951-952.) Once the parent establishes that a sibling relationship is so strong that its severance would be detrimental to the adoptive child, the court then decides whether the benefit to the child of continuing the sibling relationship outweighs the benefit of adoption. (*Id.* at pp. 952-953.)

B

We consider first whether the minors have a significant relationship with their sister, Jennifer, sufficient to trigger the application of the section 366.26, subdivision (c)(1)(E) exception. The Agency agrees that the minors and Jennifer shared a relationship. The minors and Jennifer lived together in the same house until late 2007. Jennifer went to live in a different foster home and the minors saw Jennifer on a weekly basis and participated in therapy together. Once the minors moved to Mexico, they remained in telephone contact with Jennifer. Their ongoing contact and shared experiences of living together and having become dependents together establishes that the siblings share a relationship.

However, even assuming the minors share a "significant relationship" with Jennifer, there was no showing that terminating parental rights would substantially interfere with the maintenance of further development of the sibling relationship and that it would be detrimental to the minors to sever their relationship with Jennifer. The record shows the minors did feel sad when Jennifer moved to a different foster home and this was addressed in therapy sessions. More than a year later, the minors had moved on to live in a permanent home and were doing well in their grandmother's care. They were

happy and forming an attachment to their grandmother. Further, Jennifer had different needs than the boys. Jennifer expressed wanting to live with the boys, but she did not want to be adopted and preferred to stay in San Diego. She continued to maintain a relationship with the minors and spoke to them by telephone. The record shows no evidence that it would be detrimental to the minors to sever their relationship with Jennifer. Instead, the benefits the minors would receive from being adopted outweighed the benefit of maintaining the sibling relationship.

The benefit of preserving the sibling relationship would not outweigh the benefit to the minors of being adopted by a loving and nurturing caregiver, such as their grandmother. H.N., O.N. and G.N. had been dependents for much of their lives and needed a chance at permanency. Thus, "'the court should order adoption.' [Citation.]" (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) Substantial evidence supports the court's finding that the exception of section 366.26, subdivision (c)(1)(B)(v) does not apply to preclude terminating S.S.'s parental rights.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.